

INTRATREK ZIMBABWE (PRIVATE) LIMITED
versus
ZIMBABWE POWER COMPANY (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 17 & 28 May 2019 and 17 June, 2019

Application for leave for Execute Pending Appeal

L. Uriri, for the applicant
T.S. Manjengwa, for the respondent

CHITAPI J: In the judgment HH 91/19 in the case *Blessing Mureyani v Maggie Gentie and Minister of Local Government and National Housing*, I bemoaned the increased workload which judges of this court have to deal with and the immense pressure which is exerted on judges to cope with litigants and public expectations to have disputes before the court speedily determined. I did give an insight to the public on how internally, the Honourable Judge President has to juggle around by spreading opposed applications and other civil cases amongst all judges irrespective of the division to which judges are formally assigned. It therefore does not matter that a judge is in the family, appeal, criminal or civil division. All judges will get allocated civil matters which they must manage and infuse into their rolls using opportunities which may arise. It is not unusual for a judge to therefore deal with civil applications before or after a criminal trial on the same date.

I have repeated my earlier observations because the manner in which the respondent's counsel resolved not to complement the efforts of the court to dispose of this application left me thinking that, much as judges may try to determine cases at available opportunities, without counsels co-operation, the backlog will remain untamed. Party driven litigation processes result in delays because the parties dictate the pace. My disquiet arises from the following circumstances.

This application and 5 others was referred to me on 24 April, 2019 for set down of hearing. The court was on Easter vacation which commenced on 6 April, 2019 to 12 May,

2019. Court vacations need to be understood in context. They do not connote that judges go on leave to rest. If a judge is to be on leave, the judge must formally apply for leave. Court vacations simply give a break to the normal running of courts. Litigants continue to file their cases. Judges use the vacation to try and clear reserved judgment. More often than not judges with partly heard cases which could not be completed during the times allocated for those cases avail themselves to deal with those cases. Vacations are not therefore joyous breaks for judges. If anyone enjoys the court vacations it must be the litigants and their legal practitioners because there is a break in normal set down of cases. Rule 221 (4) of the High Court Civil Rules provides that:

“4. No contested matter shall be set down for hearing during vacation unless a legal practitioner certifies in writing that it is urgent; giving reason for its urgency, and the prior approval of a judge to the hearing of the matter has been obtained.”

There is therefore a vacation in set down of cases for litigants and legal practitioners as implied in the quoted rule. They can only have their matters set down for special reasons justifying urgency. For judges it will be work as usual with the Judge President not relenting on allocating cases to judges for further management. No judge wants to accumulate cases and will make every effort to dispose of incoming work by looking for slots and setting down the cases as they are brought to the judge’s chambers. The set down of this matter was handled with the mind to slot it as with others on the next available slot. My schedule on opening of the second term was that I was assigned to bail court. I resolved to spread my allocated opposed applications to be set down at the two per day after bail court and in bail court. This is how this application got to be set down for 17 May, 2019.

In relation to the filing of heads of argument, the applicants’ heads of argument had been filed on 15 April, 2019 and served on the respondents legal practitioners on the same date. Ordinarily the respondent would have been required to file its head of argument within 10 days of service of the applicants’ heads of argument. When one discounts public holidays and weekends, the heads of argument would have been due for filing at the latest on 2 May, 2019. Rule 238 (2a) (ii) however provides in proviso (i) that the period on which the court is on vacation shall not be counted as part of the 10 day period in which the respondent is required in terms of r 238 (2a) to file heads of argument from the date that the applicant’s heads would have been delivered on the respondents legal practitioner. Proviso (ii) provides that the respondents heads of argument should be filed at least 5 days before the hearing. In terms of this latter *proviso*, where a date of set down has been fixed, the respondent

notwithstanding the periods allowed to such respondent to file heads of argument, should file the same at least 5 days prior to the hearing.

In casu, the respondents' counsel decided to take advantage of *proviso* (i) and reckoned the time for filing the respondent's heads of argument in terms of that rule. Since vacation was ending with the new term commencing on 13 May, 2019, the respondent's counsel reckoned the period for failing heads of argument from the date. The last date for filing heads of argument would accordingly have been 24 May, 2019 being 10 working days reckoned from 13 May, 2019.

By letter addressed to the Registrar dated 13 May, 2019, the respondents' counsel protested the set down date of 17 May, 2019. He submitted that the notice of set down had been served on 13 May, 2019 and that as the notice of set down had been issued on 10 May, 2019, it only allowed the respondent 4 days to 17 May, 2019 since there was a weekend in between. He protested that the issued notice "...falls foul of the provisions of the Rules" because r 233 (2a) *sic* provided that "applications which are opposed shall be set down for hearing on a business day not less than six business days from the date of notice" The corrected rules citation is of course rule 223 (3) not 233 (2a). Rule 223 (3) provides that no opposed application shall set down for hearing less than eight (not six) business days after the notice of opposition and opposing affidavit has been filed unless the respondent consents. Respondent' counsel was of course wrong in the rule citation and its application. The notice of opposition and opposing affidavit were filed on 5 April, 2019. The eight days referred to in rule 223 (3) matured on 25 April, 2019. The notice of set down did not fall foul of the rules on the basis complained of by the respondents' counsel. I would point out that there is no rule 233 (2a) in the High Court Civil Rules, 1971.

Counsel further protested that the date of issue of the notice and service of the same disabled the respondent filing heads of argument within the time contemplated in r 238 (2a) (ii). The respondent's counsel ended his letter by stating:-

"The situation can be served by your withdrawing the notice and allowing the respondent the required time to file its heads by issuing a notice that complies with r 223 (2) (a). We kindly request you to do so."

Counsel's suggestion to the Registrar to withdraw the notice of set down falls outside the purview of the powers of the Registrar. The court manages its roll and once a matter has been set down, the court or judge will hear and determine any representations by counsel in regard to the management of the set down matter. It was on the basis that I did not agree with

the lawfulness of the suggested procedure to withdraw the notice of set down that I directed the Registrar to advise counsel that the application would remain listed on the roll to be dealt with on its turn. I however directed that counsel could attend in chambers to map the way forward prior to the hearing and counsel did so.

Mr *Manjengwa* in chambers submitted that the respondent's heads had not been filed and were due by 24 May, 2019. He also pointed out to the provisions of r 238 (2a) (ii) and indicated that the 5 days postulated in the rule would be due on 20 May, 2019 reckoned from 13 May, 2019 when the notice of set down was served. In his submission; the 20th May, 2019 would have been the last day to file heads of arguments in order to comply with the proviso (ii) to r 238 (2a) which provides that the respondents' heads shall be filed not less than 5 days from the date of hearing. It is necessary to observe that the proviso (i) to r 238 (2a) is directory. The rule is enacted for the convenience of the court and not for counsel to take advantage of and advance it as a reason for a case not to be heard. In other words if it is not possible for respondent's counsel to file heads of argument at least 5 days prior to the set down date because the notice of set down has not given sufficient times between its issue and the date of the set down, this does not invalidate the notice of set down. The proviso must be read in conjunction with the principal rule 238 (2b) which carries the sanction of a bar against the respondent if the respondent fails to file heads of argument within 10 days after service of the applicants' heads of argument. A failure to comply with the 5 days for filing heads of argument prior to the date of hearing does not attract an automatic bar. It will be up to the court to consider whether it has had sufficient time to consider the matter and hear it where heads have been filed within 10 days of service of the applicant's heads but less than 5 days to the hearing date. If the court is comfortable to hear the matter where the respondents heads of argument have been filed even a day before or on the date of hearing it will hear the matter. The court will, where it is not inconvenient to deal with the matter allocate another date and postpone the hearing accordingly.

Counsel must acquaint themselves with MAFUSIRE J's judgment in *David Whitehead Textiles Limited v Jyotsanagen Kala and 2 Ors* HH 442/14 where The learned judge eloquently interrogated the import and purport of r 238 (2a), (2b) and the proviso (ii) thereto which requires that the respondents' heads of argument are filed at least 5 days before the hearing. The learned judge observed that the five days period is for the court's convenience and not for the convenience of the respondent. Mr *Manjengwa* was expected to have made effort to prepare and file heads of argument prior to the set down date or even to file them on

the date of hearing than to procrastinate and seek to rely on the proviso (ii) on the 5 days rule which is not intended to be used as an excuse by the respondent. Mr *Manjengwa* in this respect clearly adopted an attitude that was intended to frustrate and torpedo the hearing of the application much to the inconvenience of the court which had tried to manage the disposal of this application by allocating and others them a slot at the end of hearing of bail applications for 17 May, 2019.

Going forward, Mr *Manjengwa* was not about to be understanding of the court's desire to speedily dispose of matter. When I suggested that counsel could file the heads of argument by 20 May, 2019 with the hearing being slotted for after bail court on 24 May, 2019. Mr *Manjengwa* insisted that he would file the heads by 24 May, 2019 because that date was the last date by which the respondent was required to have filed heads of argument. Whilst it was true that the 10 day period for the respondent to file its heads of argument would expire on that date, I found Mr *Manjengwa's* attitude to be unreasonable in that he was concerned with his own convenience only and not the court's convenience. The rules of court should not be used to frustrate the due administration of justice but to aid and accelerate orderly case disposal. Counsel as court officers should aid in the process by supporting court and judges efforts to expeditiously dispose of pending cases. In this case, given Mr *Manjengwa's* unyielding attitude, I could in the interests of justice have directed a departure from the rules and ordered counsel to file heads of argument earlier than 24 May, 2019 as I am entitled to in terms of r 4C of the court's rules. I however decided against resorting to r 4C because of the importance of the application to the parties and that the application deals with a matter of public interest which is topical. I resolved not to exert pressure on counsel and accepted the inconvenience which the court had to endure. I ordered that Mr *Manjengwa* could file the respondents' heads of argument by 24 May, 2019 as he desired. I and postponed the hearing to 28 May, 2019. I was however surprised to hear Mr *Manjengwa* state that the 24th May, 2019 was most convenient to him besides it being also the date that he intended to file heads of argument for the respondent as appellant in the Supreme Court. I am not sure whether the submission was intended as a reminder that there was a pending Supreme Court appeal or not but it suffices that the heads of argument which were to be filed in this application were not for the Supreme Court and vice-versa.

Before I revert to the merits of this application, I wish to raise the issue of rules being used for purposes of frustrating the disposal of cases as opposed to aiding the disposal. From a jurisprudential perspective, rules of court relate to the practice of the court. Courts are

created to dispense justice. Rules of court should yield to the demands of justice in any given case hence the existence of r 4C of the rules of this court. Rules of court must be seen as serving the purpose primarily of ensuring that the business of the court is carried out in an orderly manner. It is trite and specifically provided for in s 176 of the Constitution that this court as well as the superior courts to it, being the Constitutional court and Supreme Court “have inherent power to protect and regulate their own process and to develop the common law, taking into account the interests of justice and the provisions of this Constitution.” It follows from the above that rules of court are made to regulate the court process. The court is therefore not made for the rules because it makes them. That being common cause, it is difficult to appreciate the rationale behind the *proviso* (i) to r 238 (2a). For clarity, the proviso states that the vacation period should not be counted when computing days for filing heads of argument. The rule does not apply to the filing of other pleadings like an appearance to defend in a summons matter and indeed the filing of all other pleadings be it a plea, opposing affidavits and so on. What is it about the respondents’ heads of argument that merit their being protected by implicitly extending the period for filing heads of argument in not factoring in vacation periods? The registry will be open for receiving new cases and filing of pleadings including the respondents’ heads of argument. The rule does not say that the respondents heads should not be filed during vacation. Its effect is to give the respondent a moratorium, holiday or break from moving the case forward by favouring the respondent with vacation time to use to put the matter aside and only start panicking to timeously file heads after vacation. It does appear to me that the proviso does not serve the interests of justice to the extent that it delays the filing of necessary papers which lead to the next step, that of the hearing of the matter. In this sense, proviso (i) in my view does not aid the dispensation of justice speedily. I raise this point of course because inasmuch as I have commented by giving a rather lengthy exposition on the duty of counsel to aid than torpedo the speedy resolution of justice, some rules like the proviso (1) aforesaid are taken advantage of to frustrate the resolution of cases with reasonable promptitude. If the set down of a contested matter during vacation is subject to r 221 (4) as discussed, there is no apparent reason to favour the respondent as discussed. The proviso is redundant.

I revert to deal with the application on the merits. In case No HC 8159/18 in which the parties herein were the same, the applicant filed on application against the respondent sued sued for specific performance on a contract for the engineering, procurement and construction of a 100 megawatt solar power station at Gwanda. The applicant had in that case

claimed in the alternative damages of USD\$ 25 million for breach of contract. The claim for damages was however abandoned and the court did not determine or make any award of damages in the sum of the UDS\$25 million or in any sum. The applicant's claim was limited to specific performance and it was strenuously opposed by the respondent. Consequent on the hearing, the court prepared a written judgment HH 818/18 delivered on 13 December, 2018. The operative part of the judgment was as follows:

“IT IS THEREFORE ORDERED AS FOLLOWS:

1. It be and is hereby declared that procurement contract No. ZPC 304/2015 dated 23 October, 2015 between the applicant and respondent is valid and binding between the parties.
2. Consequent on the declaration of the validity of the said contract, a decree of specific performance in terms thereof taking into account the addendum to the said contract dated 21 September, 2017 is hereby issued.
3. The parties shall meet to review progress in regard to the discharge of their obligations in terms thereof as provided for in clause 5 of the contract within 60 days of this order failing which the party in default shall be deemed to have repudiated the contract and liable in damages to and at the instance of the innocent party.
4. The respondent shall bear the costs of this application.

The detailed reasons for the order is set out in the written judgment aforesaid. A copy of the judgment is an appendage to the applicants' affidavit in this application as “Annexure B”.

Following on the judgment aforesaid the respondent noted an appeal against the whole of the judgment HH 818/18 to the Supreme Court on 7 January, 2019. The notice of appeal listed 9 grounds of appeal. In the prayer, the respondent prayed for the setting aside of the High Court order and for it to be substituted with an order that the application be dismissed with costs on the scale of legal practitioner and client. The respondent also prayed for costs of the appeal to be granted in its favour on the same punitive scale of legal practitioner and client.

The applicant having been served with the notice of appeal then filed on 22 March, 2019, this application for leave to execute the judgment appealed against pending the determination of the appeal. It is convenient to reflect on the law and principles which guide the court in determining an application to execute the court's judgement which has been

appealed against before the appeal court has determined the appeal. There does not appear to be disagreement between counsel on the general principles which guide the court. It is not necessary under the circumstances to devote undue time expounding the legal principles. The respondent's counsel in his heads of argument devoted 3 pages split into 13 paragraphs quoting various case authorities in this jurisdiction and South Africa to stress the point that at common law, the execution of a judgment is suspended by the noting of appeal. So far as the noting of an appeal will be against the judgment of a superior court, I endorse, the general propositions as correct. The court has dealt with countless applications of this nature and the law applicable to such applications is settled. In the case of *Hosea Ozia Ncube v Simbarashe Mupinga* HH 212/18 CHAREWA J stated that a litigants' right to appeal was an absolute right. I would however add that the right can be limited as for instance where parties to a dispute agree that a determination made is final and not subject to appeal or a statute provides otherwise. The learned judge however correctly stated that the consequences of noting an appeal which ordinarily is to stay execution of the judgment appealed against was subject to the court whose judgment has been appealed against granting leave to the respondent in the appeal to execute the judgment pending appeal.

The learned judge set out four fundamental principles which the court considers without assigning more importance to anyone of them as follows:

- '(a) the prospects of success on appeal, with special emphasis on whether or not the appeal is frivolous or vexatious or has been noted with no *bona fide* intention to reverse the judgment but only to buy time or harass the successful party.
- (b) the potentiality of irreparable harm or prejudice to the appellant if leave to execute is granted.
- (c) the potentiality of irreparable harm to the respondent if leave to execute is refused.
- (d) the balance of convenience or hardship as the case may be.

The learned judge cited the following judgments of the Supreme Court and I equally relate to them:

Whata v Whata 1994 (2) ZLR 277 S at 281 B; *Net One Cellular (Pvt) Ltd & Note One Employees* 2005 (1) ZLR 275 (S) at 281 B-D; *Chidyausiku v Nyakabambo* 1987 (2) ZLR 119 (SC).

See also *Stanley Machote v Zimbabwe Manpower Development Fund*. HH 13/16 where MAKONI J (as she was then) quoted further cases of *Arches (Pvt) Ltd v Guthrie Holdings (Pvt) Ltd* 1989 ZLR 152 (H); *Dabengwa v Minister of Home Affairs and Ors* 1982 (1) ZLR 223; *Zimbabwe Distance (Correspondence) Education College (Pvt) Ltd v Commercial Careers College (Pvt) Ltd v Commercial Careers College (1980) (Pvt) Ltd* 1991 (2) ZLR 61. See further the judgment of MATANDA-MOYO J in *Ladrax Investments (Pvt) Ltd v Ignatius Chirenje & Anor* HH 776/15.

There is therefore no contentious issue regarding the principles which guide the court.

It is necessary to consider the grounds of appeal which the applicant seeks to argue before the supreme. They are listed as follows *seriatim* and I comment on them in that order:

1. ***The court a quo erred by holding that there were no material disputes of fact between the parties and that accordingly the matter could appropriately proceed under the court application procedure.*** This ground of appeal is too generalized as to be meaningless because the decision whether or not the court considers that it can determine a matter on affidavits in terms of application procedure is one in the discretion of the court. In an appeal the appellant should not generalize a ground of appeal. The appeal should attack the courts findings and whether the court misdirected itself in fact or law or both. This ground of appeal is in my view not one which enjoys any prospects of success on appeal as it amounts to saying the court should have exercised its discretion against hearing the matter on application. Surely the court was entitled to hear the matter on application in its discretion. The appeal court cannot possibly fault the court for choosing to determine the matter on application. It is what the court determined which the Supreme Court may be called to find fault with. In any event the court on pp 5 – 7 of the cyclostyled judgment particularly on p 5 clearly took into account the alleged disputes of fact and adopted a robust approach. It gave its reasons for doing so.
2. ***The court a quo erred by failing to deal with the issue that the respondent did not disclose the entirety of the parties contract thereby preventing the court from adjudicating over the same.*** Again this ground of appeal is rather generalized. The applicant does not point to the contractual parts of the contract which were allegedly not disclosed nor what their impact would have been. On p 7 of the cyclostyled judgment, the court in its analysis of the contract between the parties was of the expressed view that it was not a complicated contract in content. The contract

comprised the principal contract with 7 pages and some schedules. The court considered the schedules to the contract. The court further considered the addendum to the contract which dealt with pre-commencement works and determined that the addendum was not a separate stand-alone contract because para 2 of the addendum expressly spoke to the main contract and provided that it was to be read as an amendment to the main contract which remained in full force and effect. This was the crux of the matter and largely informed the decision of the court. It is well to quote what the court determined in this regard. It stated in a lengthy paragraph on p 12 of the judgment

“A reading of the respondent’s opposing affidavit in para 16 shows that the respondent speaks to the addendum as a separate contract for pre-commencement works which it says is the only one which creates enforceable obligations. The argument is legally and factually untenable because para 2 of the addendum clearly states that the addendum was an amendment to the main contract which remained in full force and effect. It is for this reason then that by amending the original contract to allow for pre-commencement of works covered in the main contract prior to the satisfaction of the suspensive conditions, there was a tacit waiver of the commencement date the contract not being subject to the satisfaction of all suspensive conditions. The commencement date of the contract for it to make commercial sense was clearly compromised by the parties engaging in the works with outstanding obligations still to be met. It is pertinent to note that clause 6 of the main contract is clear that the agreement may only be amended by a written document duly executed by both parties in relation to the addendum. It was executed by both parties. The extension of 6 months envisaged in clause 5 would amount to an amendment of the contract and albeit the discretion to extend being that of the respondent, such discretion could only be exercised subject to other conditions having been satisfied. The conditions would have included the convening of a meeting of the parties to review progress. Again this makes sound commercial practice. The grant of a discretionary extension for the performance of an obligation must be informed by objective facts. The concerned parties would of necessity discuss the impediments to performance, review progress and assess value or justification for the extension before giving it. The requirement that parties convene a meeting first to review progress accords with good business practice.”

The court went on to note that the respondent had in para 28 of the opposing affidavit admitted that the extension as confirmed by a letter was given after the expiry date of the conditions precedent satisfaction period. The respondent unbelievably then submitted that the applicant did not protest the extension. What justification would have been there for a protestation by a party who is still in the contract and has not been elbowed out of it? The court dealt with the flawed argument of the respondent on p 13 of its judgment. The ground of appeal does not therefore enjoy prospects of success because the factual findings made by the court were consequent upon the contractual documents which the court detailed. Without

reference in the ground of appeal to what are other documents as formed the entirety of the contract were omitted or escaped the analysis of the court as led it to a misdirected factual conclusion, the ground of appeal is deemed to predictable failure on appeal.

3. ***The court a quo erred in its construction of clause 5 of the parties contract relating to fictional fulfilment (or otherwise) of the conditions precedent.*** With respect, this ground of appeal is too generalized as to be vague and embarrassing. It does not speak to what the court held in its construction nor to what construction the court should have placed on clause 5. Grounds of appeal should be clear and concise. In *Douglas Tanyanyiwa & Anor v Gwarada* SC 79/14 ZIYAMBI JA stated on p 3 of the cyclostyled judgment that “... the purpose of the grounds of appeal is to clarify issues raised on appeal so that the respondent and the court are not inconvenienced by having to read irrelevant matter.”

In *Zvokusekwa v Bikita Rural District Council* SC 44/15 GARWE JA noted that what is important in preparing grounds of appeal is that the grounds must disclose the basis upon which the decision of the lower court is impugned in a clear and concise manner. Whilst it is not within my jurisdiction to strike out any proposed ground of appeal as it is the province of the appeal court it is still within the power of the lower court whose decision has been taken on appeal to express an opinion on the soundness of the proposed ground. The ground is vague and embarrassing as I have noted to the extent that I am not even able to comment on it. The ground simply states that the court made an error in construction of a clause. Surely, by any stretch of imagination how is the court expected to appreciate the nature of its error which the appeal court is called upon to review and correct.

4. ***The court a quo erred in holding that the appellant tacitly waived express terms of the contract relating to the fulfilment of the conditions precedent.*** As submitted by Mr *Uriri* the ground raises a factual issue which the appeal court will not readily disturb as a finding in the absence of a proven misdirection. The point really is whether the error alleged is one of act or law or both. This ground of appeal must be read together with ground 5 which I daresay, I must agree with Mr *Uriri* that it is meaningless. Ground 5 reads that “The court *a quo* erred in holding that the respondent was entitled to fictional fulfilment of the conditions precedent.” This ground is embarrassing in the extreme. How does an appellant expect the appeal court to act on a bare allegation that the lower court erred in determining that the respondent was entitled to fictional fulfilment of conditions precedent, full stop. It is

important that as I should consider the grounds of appeal, continue to remind myself to exercise restraint in my analysis of the soundness of the grounds of appeal because it is the supreme court function to ultimately determine their validity. I however note that the judgment made factual findings of the circumstances from which the court determined that there was fictional fulfilment of the suspensive terms of the contract by the respondent. It is not alleged in the two grounds of appeal that there was a failure to appreciate a fact or at all or that a finding contrary to the evidence was made. Without the grounds of appeal so mentioning, it is difficult for one to hold that there are prospects of success which arise from them.

The lack of prospects of success having been noted, it must be recorded that the court devoted pp 8 – 10 of its judgment to setting out what clause 5 of the contract provided for and the interpretation to be given thereto. On p 21 of the judgment the court again by reference to clause 5 determined that since the employer was the cause of the non-performance, it could not hold the contractor at fault for none or delayed performance. These findings appear not to be impugned in the proposed appeal. The court took into account all the circumstance of the case and reached its conclusions based on that. It is not contended in the grounds of appeal that the conclusion reached was so unreasonable that no sensible person properly applying his mind would have come to the same conclusion.

Ground 6: ***The court a quo erred in its construction of the contractual obligations relating to the respondents advance payment guarantee.*** Again the nature of the error is not stated. Mr *Uriri* was correct in his submission that the court made a determination based on factual findings. The court noted on the evidence that the respondent had acknowledged liability for payment of subcontractors in the full and acknowledged position that the advance payment guarantee was still to be availed. It is an undisputable fact that at all times in the evolvment of the parties relationship in terms of the contract between them, the issue of the advance payment guarantee remained topical. Payments were made in the full knowledge that issue of the guarantee was being pursued. In the premises, there no fraud committed as there was no misrepresentation made by either party nor alleged to have been committed.

A striking feature of this contract is that efforts at obtaining the advance payment guarantee were not hidden. The State Procurement Board agreed to the restructuring of the agreement when the respondent as contractor offered to review the contract price downwards to ensure financial closure. Government through the Minister of Finance suggested that funds

be sourced through CBZ Bank because the Government was not able to clear its arrears with China Exim Bank as demanded by that bank before it could provide the funding and the guarantee. It was also part of the contractual terms in the documents executed by the parties that funding arrangement had to include the Government of the employer. The judgment in pp 16-18 adequately dealt with the funding a guarantee issues. There is no reasonable prospect of this ground succeeding on appeal.

Ground 7- ***The court erred in its construction of the contractual obligations relating to the respondents advance payment in guarantee.*** This ground again is open ended and thus embarrassing. The short comment to it is that the court considered various factual developments that occurred which in its view frustrated the respondent from performing the contract. The matters which stalled performance resulted from the conduct of the applicant. The applicant for example was found to have caused the arrest of the respondent and its managing director thereby frustrating the performance of the contract. As regards the applicants' denial that it did not cause the arrest of the respondent, the court considered its records and the allegations which were made against the respondent and its managing director before the court on remand. The applicant's board is the complainant. An appeal court cannot by any stretch of imagination find otherwise. It is not the respondent's fault that the managing director who deposed to the opposing affidavit denying causing the arrest and the board did not know what the other was doing. Ultimately, the undisputed fact was that the respondent and its managing director were arrested in connection with the contract at the instance of the applicants board. Bail conditions were imposed which impacted on the freedom to execute obligations under the contract. There are no prospects of success that the ground of appeal will succeed.

Ground 8 and 9 may conveniently be considered together. They are couched as follows;-

8. ***The court's order requiring the parties to meet as provided for in clause 5 of the contract contradicted its findings in relation to the fulfilment whether by wavier, fictional fulfilment or otherwise or the conditions precedent.***

9. ***The court a quo erred in ordering specific performance of the contract when the respondent had not performed/had breached its obligations in terms of the pre commencement works contract.***

The above grounds sets one to wonder whether the appellant's counsel who drafted the grounds of appeal appraised himself with the record of evidence and the judgment. The

court's judgment was that there was no stand-alone contract for pre-commencement works divorced from the rest of the contract No ZPC 304/2015. The one speaks to the other. Even the scope of works to be carried out as pre-commencement works were a step or stage in the performance of the contractors obligations under the contract. It will be difficult for the respondent to convince the appeal court that there was error in ordering specific performance. At the hearing I asked Mr *Munjengwa* for the respondent to clarify which part of the judgment it is which ordered the specific performance which the respondent sought to impugn and the form or manner of such specific performance. Mr *Munjengwa* submitted that the respondent considered that the court erred in giving a time line for the parties to engage and in further placing a sanction of deeming a defaulting party to be in breach of contract. It is important to express in simple terms the import and purport of the court's order. The court ruled that the contract between the parties in whole was still extant until properly terminated in terms of its provisions. This meant that a properly termination is one done in terms of its provisions. Any purported termination other than in terms thereof would constitute a breach or repudiation of the contract. Going forward the court determined that the contract provided for a dispute resolution mechanism and steps that parties take to resolve disputes arising from the contract. The 60 days was considered overallly as a reasonable period for the parties to refer to and relate to the dispute resolution mechanisms provided for in the contract. In the grounds of appeal there is no suggestion that the court could not properly give a time line for compliance with its order. In any event the 60 days was for engagement and the court did not suggest that the parties need to agree on their disputes within that period. These two grounds of appeal clearly have no prospects of success. This is moreso given that specific performance is a discretionary remedy which the court may grant. In the absence of misdirections of law, fact or both the appeal court would be unlikely to find fault overallly with this court judgment.

Having found against the respondent that the appeal has no prospects of success, I must consider other factors which impact on whether or not this application should be granted or dismissed. The applicant argued that the order made by the court was in the form of a declaratory order and that a declaratur is not appealable. The applicant's counsel relying on *Mushishi v Lifeline Syndicate & Anor* 1990 (1) ZLR 284 (H) argued that the purport of the court's order was to declare what the parties rights have always been and does not give them anything which they did not have. Indeed, a declaratur declares what is or should be. The court declared the contract to be still extant- and for parties to abide its terms or face

consequences. The applicant also relied upon the case of *Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 to emphasize that a declaratory relief is not affected by the noting of an appeal and that goes for relief consequential upon the declaration.

In response to the applicant's submission on the appealability of a declaratory order, Mr *Munjengwa* submitted that the order of the court was both declaratory and constitutive in that the court ordered the parties to conduct themselves in a certain manner and meet within 60 days. It is this order of specific performance which counsel pointed out to as falling outside the realms of a declaratory order. I did not hear counsel to argue that a declaratory order can be subject of appeal nor to criticize the pronouncement made by the court in the cited cases quoted by the applicant's counsel.

In my view the arguments proffered by both counsel raise a matter best answered by the Supreme Court. It being a matter of law, the applicant will be free to ventilate it on appeal. I express no contrary opinion on the point save to endorse the *dicta* of this court as set out in the judgments cited by applicant's counsel on the nature and effects of a declaratur as regards it on appeal is concerned. My findings of no prospects of success on appeal which I made following a consideration of the respondent's grounds of appeal and the judgment are not based upon or informed on the issue of whether or not a declaratory order can be appealed against.

In regard to the potentiality of irreparable harm to the respondent if leave is granted, I have carefully considered the opposing affidavit. I did not find anywhere where the respondent lists the harm that it will suffer if it engages in discussion with the applicant to resolve whatever disputes have arisen between them in terms of the provisions of the contract. At best the respondent has averred that the applicant will not suffer prejudice if leave to execute pending appeal is refused. From a common sense point of view, the respondent is the one that has taken the judgment on appeal. One assumes that in taking the decision to appeal, the motivation is not to test the waters but to have an injustice corrected. It would be expected then that the respondent should plead the negative effects upon it or its operations of the judgment appealed against if left to stand. In this regard, there is no question but that the contract involves a project of national importance and strategy. The project was granted a special national project status. The electricity envisaged to be produced upon successful completion of the project is not for the consumption of the applicant and respondent but it benefits the whole nation since the power produced is fed into the national grid. If there is any prejudice to be suffered by the respondent at all were it to comply with

the order of the court, such prejudice is in the nature of self esteem. The prejudice which results from delays in resolving the disputes between the parties by dialogue in terms of the provisions of the contract is to the public and the country's development. I therefore hold that there is no prejudice to be suffered by the respondent if leave to execute pending appeal is granted because the court order essentially declared that the relationship between the parties is still in existence and the parties must, using the provisions for dialogue and dispute resolution provided for in the contract engage and relate. They will be free to agree or disagree. It boggles the mind to appreciate what the difficulty in engaging in regard to the parties contractual relationship is.

I must also consider the potentiality of irreparable harm to the applicant if I refuse leave to execute pending appeal. The starting point is to appreciate that there has been and continues to be potential injury to the applicant's business interests. The applicant stands accused of failing to perform on its obligations. It in turn points out that it is the conduct of the respondent which made performance impossible and further that the respondent's continued conduct of refusing to engage and discuss its disagreements of dispute with the applicant has stalled the performance of the applicants' obligations on the contract. The applicants in the founding affidavit expresses its *bona fides* in having the contract executed for the benefit of the public cause. In paragraph 30 of the founding affidavit, the deponent states:

"30. On the other hand, allowing the appeal to sabotage progress will benefit no one at the end. By the time the ill failed appeal is dismissed, a lot of valuable time would have been filtered away in pursuit of an unedifying cause."

In response, the respondent in paragraph 25 of the opposing affidavit denied that the applicant stood to suffer irreparable harm actual or potential. What is telling and perhaps explains the respondents' attitude and bears on its *bona fides* is the following statement:

".. I however wish to state that the execution of the order will saddle the respondent with a contract, in which the funding provisions, as envisaged by the parties have not been satisfied. The burden of funding the project to the tune of usd\$172 848 597-60 would fall on the respondent in the absence of a financier. This is contrary to what the parties envisaged, that is, only upon the successful signature of all the project financing agreements and the first draw down of funds, as provided in the first (*sic*) of the conditions precedent would the contract commence. It is specifically because the respondent could not self-fund this project that condition precedents relating to outside funding were put in the contract. This is the biggest hardship the respondent will suffer if the order is carried into execution pending the determination of the appeal."

From the respondent's deposition as quoted, it emerges that the respondent is not motivated by the desire that a wrong judgment is corrected on appeal. The appeal is motivated by the fear or apprehension that engagements with the applicant and recognition of the declaratory order holding the contract extant has the potential to expose the respondent to paying money which it does not have. Whether by bad judgment or wrong advice, the respondent has let the cat out of the bag. It is trying to clutch at straw to avoid potential liability for payment. The respondent's spirited stance is not all about the contract being validly ended but there are other extraneous considerations. I must say that if the contract envisaged that funding will be sourced from offshore, I do not immediately appreciate the respondent's problem. The picture which now emerges is that, with offshore funding having stalled on account of the Government's inability to clear its arrears with China Exim bank to unlock new funding and Government suggesting that the respondent tries to secure the money locally through banks like CBZ; the respondent became fearful that it may have to self-fund if it is held to the contract. The respondent with due respect as evidenced by its depositions is appealing the judgment for selfish, self-serving and ulterior reasons. It is no wonder that the proposed grounds of appeal have no prospects of success. The motive for appealing is improper. It is disgraceful that national projects are stalled by contracting parties having merry dances in the courts instead of dancing in boardrooms and at the projects sites and seeing to the projects coming to fruition. It will remain a mystery that a party to written a contract properly advised spurns a window for engagement with the other contracting party especially so where the court in ordering engagement with the other contracting party has taken into account that the contract it declared valid not only provides for engagement but the order itself leaves it open to the parties to discuss their disputes in relation to the contract.

Dealing with the balance convenience, it is clear that the balance of convenience is in favour of granting leave to execute pending appeal. What is to be executed is the contract by engagement of the parties. It has already been observed that the subject matter of the contract is of immense national importance. It is of public interests. The public wants electricity for use at home and in industries. The public is not interested in bickerings for self-interest and egos on the part of state actors and their contractors. In the court case where the judgment is under appeal, serious allegations were made against the applicant that it was paid in excess of US\$5 million for no value received by the respondent. The applicant disputed this. The court did not make a determination on that and instead referred the parties disputes back to them to resolve in terms of the contract on dispute resolution. For clearly unmeritorious

considerations the respondent refuses to engage and has filed an appeal for purposes of delay instead of adopting an attitude that advances the performance of the contract or its lawful termination. The national interests being held at ransom by the attitude of the respondent as outlined.

In such circumstances, the balance of convenience favours that leave to execute pending appeal be granted. The parties' engagement as ordered by the court does not close the doors of the courts to them. They can always come to court with unresolved disputes but within the parameters of dispute resolution stipulated in the contract.

In relation to costs, each party has prayed for costs on the scale of legal practitioner and client scale. There is no sound justification advanced for an award of costs on the punitive scale by either party. Neither of the parties has improperly conducted itself or through counsel in the prosecution and defence of their positions. Costs on the ordinary scale will be ordered and they will follow the result.

Before I endorse my order, I wish to place on record that both counsel assisted the court immensely in their well-researched heads of arguments. Although my judgment does not cite all of the cases cited in the heads of argument their number showed that great effort was put in preparing the heads. Such efficiency as demonstrated is unfortunately becoming exceedingly rare from what the court continues to experience in the standard of work presented by legal practitioners. The quality of judgments can only improve where well researched heads of argument are prepared by counsel for the court's assistance. Unfortunately in court determinations there has to be a winner and a loser. There is no draw.

In the result I dispose of the application as follows

1. Leave to execute the judgment of this court HH 818/18 is granted and the said judgment shall be given full effect notwithstanding the appeal noted by the respondent to the Supreme Court under case No. SC 2/19 on 7 January 2019.
2. The respondent shall pay the costs of this application.

Manase & Manase, applicant's legal practitioners
Wintertons, respondent's legal practitioners